



# Federally Speaking



No. 22 [Revised]

by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column Federally Speaking. The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA.*

## **LIBERTY'S CORNER**

**THE OUTER LIMITS?** "There is nothing wrong with your television set. Do not attempt to adjust the picture. ... You are about to experience the awe and mystery which reaches from the inner mind [of the Attorney General] to the Outer Limits" of **Government** conduct. Or so says the **ACLU**! At its recent "Keep America Safe and Free" Press Conference, the **American Civil Liberties Union** detailed three alleged episodes of what it views as the **Government** stepping beyond the "Outer Limits" of our **Constitution** and thereby "terrorizing" American citizens, in the name of anti-terrorism. **Episode One: Sister Virgine Lawinger**, a nun, is a member of a "Wisconsin group called **Peace Action**. Last April, she was among a group of 20 activists who were barred from boarding a domestic flight and detained for questioning. The group was going to Washington to demonstrate against the School of the Americas and to learn how to lobby. To this day, no official involved has told them why there were detained and barred from flying." **Episode Two: Miss B. J. Brown**, a first year college co-ed, was visited by the "SS," the "Secret Service" because someone anonymously reported she had in her possession a poster critical of President Bush. The **Secret Service** interrogated her at length. Even after they concluded that the poster was harmless, they wanted to know whether she had any maps of Afghanistan or 'pro-Taliban stuff' in her apartment." **Episode Three: Danny Miller**, last November, on a regular visit to the post office with a colleague, "attempted to purchase 4,000 stamps for a mailing they were doing. They requested stamps without the American flag. The clerk asked if Statue of Liberty stamps were OK and they replied, 'Yes, we love liberty.' The clerk called the police, and Danny and his colleague were questioned about their patriotism. They were unable to purchase stamps that day. The next day when Danny's colleague returned to the post office he was asked to meet with the **Postal Inspector**, who quizzed him at length about the **Voices in the Wilderness** group... a group that opposes economic sanctions against Iraq," and a group for whom "Danny has traveled the world." **You be the Judge!** Were the "outer limits" breached? (Our December 2002 column will report on the **ACLU's** "Keep America Safe and Free" Campaign.)

**CREPPY'S "STAY" at THE Supreme Court.** As of this writing seven (7) **Article 3** U.S. Federal Judges have found the **Creppy Directive's** blanket closure of all special interest deportation hearings to be **unconstitutional**. They are U.S. Circuit Judges Daughtrey, Keith and Scirica, and U.S. District Judges Bissell, Carr, Edmunds and Kessler. Moreover, according to the **Third Circuit** majority opinion in **North**

*Jersey Media Group v. Ashcroft* (3<sup>rd</sup> Cir 2002; No. 02-2524), this was done with such “eloquent language” as “Democracies die behind closed doors, . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation;” to which Judge Kessler added, “secret arrests are a concept odious to a democratic society” (see May, July and October, 2002 *Federally Speaking* columns). These **Article 3** Judges believe that **constitutionally** deportation hearings may only be closed, on a case-by-case basis, by the Immigration Judge hearing the matter, not by a general “directive” (see *Detroit Free Press v. Ashcroft*, 2002 U.S. App. LEXIS 17646 (6th Cir. 2002)). Now two **Article 3** Judges in the **Third Circuit** have upheld the **Creppy Directive**, Circuit Judges Becker and Greenberg, with Circuit Judge Scirica dissenting (*North Shore Media, supra*), making the current “score” 7-2. Interestingly, this **Third Circuit** decision upholding the Creppy Directive was handed down only after the rulings by the **U.S. District Court for the District of New Jersey** and the **Third Circuit**, itself, denying the Government’s motion for a stay pending appellate review of the **District Court’s** finding of **unconstitutionality**, were overturned by the **U.S. Supreme Court** granting the stay. In the words of the **High Court**: “The application for stay presented to Justice Souter and by him referred to the Court is granted, and it is ordered that the preliminary injunction entered by the **United States District Court for the District of New Jersey** on May 28, 2002, is stayed pending the final disposition of the government’s appeal of that injunction to the **United States Court of Appeals for the Third Circuit**” (*Ashcroft v. North Jersey Media Group*, 536 U.S.\_\_\_\_, No. 01A991, June 28, 2002). One wonders whether this action by the **Supreme Court** influenced or even re-directed the outcome in the **Third Circuit**. In any event, if not modified by the **Third Circuit** sitting **en banc**, with such a “conflict between the circuits,” this question is certainly ripe for the granting of **certiorari** by the **U.S. Supreme Court**. (Our December 2002 column will examine the Third Circuit’s *Creppy* opinion.)

## **FOLLOW-UP**

**BUSH OPPOSES PATENT BUSHWHACKS.** Under “*Gray Panthers’ Fight Back*,” in the August 2002 *Federally Speaking* column, we report on AARP’s fight in *In Re: Buspirone Antitrust Litigation* (SDNY, MDL Docket No. 1410, consolidated August 15, 2001), which alleges “bushwhacks” by prescription drug patent-holder of generic competitors through the bringing of groundless “patent infringement litigation against these competitors, and thereby triggering the automatic 30-month stay of **FDA** approval of these generics (see the **Hatch-Waxman Amendments**, **21 U.S.C. § 355**, to the **Federal Food, Drug and Cosmetic Act**, **21 U.S.C. § 301, et seq. (1994)**).” The **FTC** recently confirmed that this anticompetitive practice is becoming much more prevalent among patent-holding drug companies. Now President Bush has entered the fray by announcing his Administration’s intent to seek to derail this practice, leaving the “big brand guys” with feelings of being set-up for the Bush-meister for bushwhackings themselves. (See also “*Prescription Drug Coverage Now!*”, *Federally Speaking*, October 2002.)

**POLITICS AT BAY.** According to Thomas Ferraro of **Reuters**, the **U.S. Supreme Court’s** ruling in *Bush v. Gore*, 531 U.S. 98 (2000), which was by a divided **Court** allegedly splitting along political and/or ideological lines, “effectively decided the 2000 presidential election in favor of Bush when it refused a request by Democrat Al Gore for a recount of thousands of disputed Florida ballots.” No matter whether or not you look upon *Bush v. Gore* as a political decision, at least the same cannot be said with regard to the **Supreme Court’s** immediate response to the recent New Jersey senatorial ruckus. **Article I, Section IV, Clause 1, of the U. S. Constitution** provides that: “The Times, Places, and Manner of holding Elections for **Senators** and **Representatives**, shall be prescribed in each State by the Legislature thereof.” Pursuant to this constitutional mandate, the New Jersey Legislature enacted such election laws and, as it does with all New Jersey legislation, the New Jersey Supreme Court interprets and rules upon them. With regard to the withdrawal, in disgrace, of Senator Robert G. Torricelli as the Democratic U.S. Senatorial candidate less than 35 days prior to the election, the New Jersey Supreme Court ruled that the substitution of former

U.S. Senator Frank Lautenberg was permissible, "having concluded that the equitable relief sought herein is not inconsistent with the precedent of this Court and the terms of the statute," that "N.J.S.A. 19:13-20 does not preclude the possibility of a vacancy occurring within fifty-one days of the general election," and that "the Court should invoke its equitable powers in favor of a full and fair ballot choice for the voters of New Jersey" (*The New Jersey Democratic Party, Inc. V. Samson, N.J. Attorney General* (NJ Sup Ct, A-24 Sept Term 2002, No. 53,618, Oct 2. 2002)). In response to the Republican's again baying to the U.S. Supreme Court to hold the Democrats at bay, the High Court issued the following "Order in Pending Case ... The application for stay presented to Justice Souter and by him referred to the Court is denied" (*Forrester v. New Jersey Democratic Party, Inc.*, 537 U.S.\_\_\_\_, No. 02A289, Oct 7, 2002). It waits to be seen if there will be more such barking, baying and holding at bay; or if we can returning to those idyllic imaginary days of living like a Bey in opulent bay robes, with brimming bays, bountiful bay leaf buns, sunny bay windows, balmy bay views, splashes of bay rum, and old Bay at bay at the bayberry bush. Or better yet, viewing some bodaciously audacious re-runs of *Bay Watch* (but, perchance, that's just what we're already doing!).

**DEATH TO HANGING CHADS!** "America's independence from hanging chads, butterfly ballots and a broken outdated election system that nearly provoked a **constitutional crisis** two years ago," is how Representative Steny Hoyer (D-Maryland) characterizes the new "**Help America Vote Act of 2002**" (**H.R. 3295**), which may well be the law of the land when you read this column (see '**No More Pregnant Chads?**' *Federally Speaking*, June 2001). While finding certain alleged deficiencies effecting Latino, poor and/or illiterate potential voters in the areas of the requirements of even needing the minimal degree of "anti-fraud" voter ID specified, and of having citizenship "check-off" boxes, the **Leadership Conference on Civil Rights**, which identifies itself as "the nation's oldest, largest and most diverse civil rights coalition," has acknowledged that this Act contains a number of beneficial provisions. These they identified as including: a) the setting of uniform minimum standards for federal elections nationwide; b) the providing voters with a chance to check for and correct ballot errors; c) the mandating of accuracy of state voter registration databases through the implementation of uniform, statewide computerized lists; d) the providing for provisional ballots, which allow voters who are erroneously left off the voter registration lists to vote and be counted once eligibility can be verified; e) the eliminating of outmoded punch-card and lever voting systems, and upgrading voting systems and equipment in every state; and f) the providing of funding to enable that voters with disabilities can cast ballots privately and independently. The Act also establishes an **Election Assistance Commission** to set voluntary guidelines for States, and appropriates \$3.9 billion for the purposes of this Act. As you will remember, it was estimated that of the over 100 million ballots cast in the 2000 Presidential Election, up to 2.5 million of them were never counted due to a variety of reasons, including the famous "Hanging Chad," a Florida homeboy, who caused many a vote to be lost, possibly even enough to have given Florida and the country to Gore. Hanging Chad and Pregnant Chadette owed their existence to hole-punchers not penetrating all the way through the paper/cardboard ballots, leaving these poor folk either "hung" or "pregnant." The **Help America Vote Act** will, hopefully, do neither, but will instead condemn all future generations of these mischievous chads to oblivion. Speaking of helping voters and oblivion, **Secretary of State** Collin Powell reportedly recently observed with regard to Saddam Hessian "helping" Iraqi voters to cast 100% of all ballots for him: "In Iraq there are no hanging chads, just hangings."

**THE FEDERAL CORKBOARD™ REMINDER:** SUPREME COURT UPDATE. Wed, March 12, 2003, all day CLE at Federal Courthouse, with U.S. Supreme Court Clerk General Suter. (Call Susan Santiago for details - 412/281-4900).

*This is an extra edition of Federally Speaking. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J.*

*Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com). Federally Speaking thanks LexisNexis for aiding in research. Copyright© 2002 by the Federal Bar Association, Western Pennsylvania Chapter.*